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 7 SINCO TECHNOLOGIES PTE LTD

8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA

10
 11 SINCO TECHNOLOGIES PTE LTD,
 12 Plaintiff,

13 v.
 14 SINCO ELECTRONICS (DONGGUAN) CO.,
 LTD.; XINGKE ELECTRONICS
 (DONGGUAN) CO., LTD.; XINGKE
 ELECTRONICS TECHNOLOGY CO., LTD.;
 SINCO ELECTRONICS TECHNOLOGY
 CO., LTD.; MUI LIANG TJOA (an
 individual); NG CHER YONG aka CY NG (an
 individual); and LIEW YEW SOON aka
 MARK LIEW (an individual),

15 Defendants.

16 AND RELATED ACTION.

17 Case No. 3:17CV5517 EMC

18 The Honorable Edward M. Chen

19 **PLAINTIFF SINCO TECHNOLOGIES**
PTE LTD'S MEMORANDUM OF
POINTS & AUTHORITIES IN
SUPPORT OF ITS DAUBERT
MOTION TO STRIKE THE EXPERT
REPORT OF DEFENDANTS'
DAMAGES EXPERT HENRY KAHRS
AND TO PRECLUDE MR. KAHRS
AND ADRIAN FLEISSIG FROM
TESTIFYING AT TRIAL

20 Date: TBD
 Time: TBD
 Courtroom: 5
 Judge: Hon. Edward M. Chen

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1 **I. INTRODUCTION**

2 At trial, Defendants Sinco Electronics (Dongguan) Co., Ltd., doing business as Xingke
 3 Electronics (Dongguan) Co., Ltd.; Mui Liang Tjoa; Ng Cher Yong; and Liew Yew Soon (herein
 4 “XINGKE”) will offer “expert” damages opinions and testimony of Henry J. Kahrs and Adrian
 5 Fleissig, where XINGKE has designated only Mr. Kahrs to testify to SINCO TECHNOLOGIES
 6 PTE LTD.’s (“PLAINTIFF” or “SINCO”) damages. This motion is made on the grounds that
 7 Mr. Kahrs’ opinions: (1) are not premised on an objective and reliable evidentiary basis that is
 8 appropriate for an expert opinion on the matters presented; (2) are not directed to damages but as
 9 to liability with a determination of the ultimate legal issue; and (3) create a danger of unfair
 10 prejudice, confusion of the issues, and misleading of the jury, all of which would outweigh the
 11 probative value of the testimony. Federal Rule of Evidence (“FRE”) 104, 401 - 403, 702, and 703.

12 This Court should exclude any opinions and/or testimony from Mr. Kahrs and Mr.
 13 Fleissig because 1.) Mr. Kahrs strays far from the field of his asserted expertise as to damages and
 14 asserts, as an opinion, Defendants’ legal conclusion of non-infringement;¹ and 2.) methodology
 15 and analysis in Mr. Kahrs report is not his own and SINCO was unable to cross-examine the true
 16 author, Mr. Fleissig, on the portion of the report written by Mr. Fleissig.

17 The damages experts in this case should be limited to the evaluation of damages, upon the
 18 assumption that the jury ultimately finds trademark infringement. Mr. Kahrs’ expert opinions
 19 assert that there was ***no consumer confusion***, and hence no trademark infringement, which is a
 20 fact question reserved for the Jury, based on his incomplete understanding of the law, which is a
 21 legal question for the Court to inform the Jury. These opinions of non-infringement are legal
 22 conclusions that are not based on damages calculations or scientific principles. Mr. Kahrs ignores
 23 the possibility of trademark infringement to assert there was no damages, hence no analysis,
 24 which begs the question what is the purpose of his report? Mr. Kahrs provides no mathematical
 25 damages calculation that would aid the Jury, his opinions do not aid the Jury and cloak
 26 Defendants’ theory of the case as “Expert” opinions, to prejudice SINCO’s case. FRE 403.

27
 28 ¹ Gaitan Decl. Exh. B

1 Mr. Kahrs' criticism of SINCO's Expert for not providing opinions of "customer
 2 confusion," foreshadows the focus of his conclusion¹ of no trademark infringement, for which he
 3 is not qualified. Mr. Kahrs states that he *analyzed the existence of customer confusion or the*
 4 *lack thereof.* (*Declaration of Daniel Gaitan in Support of this Motion "Gaitan Decl." at Exh. B*
 5 pg. 12-13.) Mr. Kahrs completely hijacks the role of the Jury by determining, absent any
 6 mathematical calculation or special knowledge, to arrive at the opinion that there was no
 7 customer confusion, pp. 12-20, guided only by the cherry-picked facts that XINGKE provided out
 8 of context and incomplete. *Id.* at pg. 12-20.

9 The only actual damages analysis in Mr. Kahrs' report was that of Mr. Cox and Mr.
 10 Fleissig, not Mr. Kahrs. XINGKE failed to provide the required disclosures under Federal Rule of
 11 Civil Procedure ("FRCP") Rule 26 (a)(2) as to Mr. Fleissig prior to **February 6, 2020**, which was
 12 the close of Expert discovery. This Court should exclude any opinions Mr. Kahrs' refers to as
 13 "the regression stuff," authored by Mr. Fleissig. *Gaitan Decl.* at Exhibit C 155:14-24. The fact
 14 that Mr. Fleissig's opinions are not those of Mr. Kahrs, was also evidenced by the email
 15 XINGKE's counsel emailed SINCO's counsel (in support of Mr. Kahrs report), during the
 16 deposition, in the afternoon, entitled "Fleissig Analysis.xls." *Gaitan Decl.* at Exh. J pg.2.

17 Mr. Kahrs testimony and opinions should be stricken and excluded on the grounds that
 18 they do not comport with the requirements of FRE 702 and the standards set forth by the Supreme
 19 Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) ("Daubert"). Mr.
 20 Kahrs has failed to support his purported expert opinions with the type of quantifiable and
 21 defensible data required under Federal law and procedure

22 **II. FACTUAL BACKGROUND**

23 **A. Overview of the Parties Relationship**

24 SINCO is a company organized under the laws of Singapore, with its headquarters in
 25 Singapore. SINCO provides a wide selection of designed-and-made to order items such as rubber
 26 keypads, keypads with chrome and electro-plated, metal to rubber bonding, engineering rubber
 27 components, and plastic buttons. SINCO also develops the tooling to make these unique parts.

28 SINCO develops the original tooling and dies for the requested item, and when approved

1 SINCO issues a Purchase Order to a contract manufacturer, such as XINGKE to have the item
 2 mass produced using SINCO's tooling and dies. XINGKE would thereafter be subject to the
 3 terms and conditions upon accepting the Purchase Order. *Gaitan Decl.* Exh. C at 48:18-25. (Mr.
 4 Kahrs did not review the terms and conditions to purchase orders. *Id.*) Until about 2017 defendant
 5 XINGKE was a contract manufacturer supplying to SINCO pursuant to SINCO's specifications.
 6 There is no transaction directly between the contract manufacturer² and SINCO's customer—
 7 until XINGKE began soliciting directly using SINCO trademarks. Defendants Mark Liew and Cy
 8 Ng were employees of SINCO stationed to oversee the manufacturing process for SINCO and
 9 communicate with SINCO's customers in the United States during the process. Defendant
 10 Defendants Sinco Electronics (Dongguan) Co., Ltd. had a limited license to use SINCO
 11 trademarks on products manufactured for SINCO, pursuant to the terms and conditions of the
 12 Purchase Orders that XINGKE accepted from SINCO. XINGKE had no rights to use the SINCO
 13 trademarks in the U.S. In or about 2016 XINGKE began directly soliciting customers in the U.S.
 14 using the SINCO trademarks and SINCO employees, without the knowledge or consent of
 15 SINCO. SINCO has alleged damages as a result of said conduct.

16 **B. XINGKE's Damages Experts**

17 On **January 16, 2020**, XINGKE disclosed Mr. Kahrs as a testifying Expert. *Gaitan Decl.*
 18 Exh. O. On **January 23, 2020**, XINGKE disclosed Mr. Fleissig as a non-testifying Expert ("he is
 19 "staff"... However, he will not be offering any reports or opinions in this case") followed by his
 20 resume on **January 29, 2020**. *Gaitan Decl.* Exh. N. The following day, **January 30, 2020**,
 21 SINCO received a link to Mr. Kahrs FRCP Rule 26 report. *Gaitan Decl.* Exh. M. On **February**
 22 **4, 2020**, SINCO's counsel deposed Mr. Kahrs. *Id.* at Exh. C.

23 **C. Mr. Kahrs' Expert History**

24 Mr. Kahrs has been a damages expert since 1985. During the first 15 years of his career
 25 he worked mostly for insurance carriers on first-party losses. *Id. at Exh. C* 39:2-8. In the first 15
 26 years he handled no intellectual property cases. *Id.* at 39:14-16. For the last 20 years he
 27 transitioned into litigation support, wherein he has worked on an estimated 10-12 trademark

28 ² Customers may visit the contract manufacturer facility to inspect quality and the like.

1 cases. *Id.* at 39:24-40:2. Mr. Kahrs estimates that three – four of those trademark cases were in
 2 Federal Court. *Id.* at 40:20-23.

3 On July 19, 2007, Judge George Schiavelli excluded the expert testimony of Mr. Kahrs as
 4 to copyright infringement damages based on the argument that “the methodology used by Mr.
 5 Kahrs is riddled with unsupported assumptions and is, at best, unscientific.” *Id.* at Exh. A. A
 6 similar concern is the subject of this motion as XINGKE proposes to allow the following
 7 testimony be presented to the Jury from Mr. Kahrs:

8 *Kahrs.* [REDACTED]

9 [REDACTED]
 10 [REDACTED]
 11 Q. You said that no damages; right?

12 *Kahrs.* [REDACTED]
 13 [REDACTED]

14 Q. So you're assuming that there was no infringement based on that?

15 *Kahrs.* [REDACTED]

16 Q. There could be infringement, but no damages?

17 *Kahrs.* [REDACTED]

18 Q. How come?

19 *Kahrs.* [REDACTED]
 20 [REDACTED]
 21 [REDACTED]

22 Exh. C 82:11-83:9. While factual inaccurate it is also not the state of the law and would not be
 23 helpful to the Jury. Later, Mr. Kahrs testified:

24 *Kahrs.* [REDACTED]
 25 [REDACTED]

26 *Id.* at 85:18-21. Ironically the only time Mr. Kahrs opinion provides a calculation as to potential
 27 damages, it is the calculation of SINCO's expert who determined a 14% margin. *Id.* at 210:5-12.

1 **III. LEGAL ARGUMENT**

2 Mr. Kahrs expert report and proposed testimony are anchored in the legal conclusion³ that
 3 there was no consumer confusion and no trademark infringement, which would serve to do
 4 nothing more than tell the jury what result it should reach. The law would be in a curious state if
 5 jurors received their instructions on the law from an expert witness as well as from the trial judge.
 6 *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 97 (2d Cir.). Resolving doubtful
 7 questions of law is the distinct and exclusive province of the trial judge. *United States v.*
 8 *Weitzenhoff*, 35 F.3d 1275, 1287 (9th Cir.1993). Expert testimony here would have been not only
 9 superfluous but mischievous. *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051,
 10 1059 (9th Cir. 2008).

11 **A. Standard for Admissibility of Expert Testimony**

12 Expert testimony may only be admitted in a manner consistent with the FRE, Daubert, and
 13 more recent appellate court cases. First and foremost, expert testimony is not to tell the jury how
 14 it (the jury) is to decide an ultimate issue. *United States v. Diaz* 876 F.3d 1194, 1197 (9th Cir.
 15 2017). It is fundamental that opinion testimony is permitted in order to aid and assist the jury. A
 16 plain reading of FRE 702 says the role of the expert is to assist the jury to understand the
 17 evidence, not to tell the jury what to conclude from the evidence.

18 FRE 702 specifically provides that:

19 A witness who is qualified as an expert by knowledge, skill, experience, training,
 20 or education may testify in the form of an opinion or otherwise if: (a) the expert's
 21 scientific, technical, or other specialized knowledge will help the trier of fact to
 22 understand the evidence or to determine a fact in issue; (b) the testimony is based
 23 on sufficient facts or data; (c) the testimony is the product of reliable principles and
 24 methods; and (d) the expert has reliably applied the principles and methods to the
 25 facts of the case.

26 That applies to all expert testimony, not just scientific testimony. *Kumho Tire Co., Ltd. v.*
 27 *Carmichael*, 526 U.S. 137, 148-149 (1999) (applying *Daubert* to all expert testimony). And it
 28 applies to rebuttal experts. *Allen v. Brown Clinic, P.L.L.P.*, 531 F.3d 568, 573-74 (8th Cir. 2008).

3 ..

.” Gaitan Decl. at Exh B 19:15-19.

MPA ISO PLAINTIFF'S DAUBERT MOTION

TO EXCLUDE TESTIMONY

3:17CV5517 EMC

1 Thus, while Mr. Kahrs may be a rebuttal expert his testimony must nevertheless qualify under
 2 FRE 702 and *Daubert*; and not be excluded by FRE 403.

3 In *Daubert*, the Supreme Court listed factors that a court may consider in
 4 determining whether expert testimony is sufficiently reliable to be admitted into
 5 evidence, including: (1) whether the scientific theory or technique can be (and has
 6 been) tested, (2) whether the theory or technique has been subjected to peer review
 7 and publication, (3) whether there is a known or potential error rate, and (4) whether
 8 the theory or technique is generally accepted in the relevant scientific community.
 9 *Lucido v. Nestle Purina Petcare Co.*, 217 F. Supp. 3d 1098, 1109 (N.D. Cal. 2016), citing
 10 *Mukhtar v. Cal. State Univ.*, 299 F.3d 1053, 1064 (9th Cir. 2002). These factors are not
 11 exhaustive. Indeed, the Supreme Court emphasized that “whether Daubert’s specific factors are,
 12 or are not, reasonable measures of reliability in a particular case is a matter that the law grants the
 13 trial judge broad latitude to determine.” *Kumho Tire Co., Ltd.* at 153.

14 In *Daubert*, the Supreme Court “established that a trial judge has the obligation to ensure
 15 that expert evidence is relevant and reliable[.]” *Milward v. Rust-Oleum Corp.*, 820 F.3d 469, 473
 16 (1st Cir. 2016), citing *Daubert*, 509 U.S. at 591; see also *Kumho Tire Co. v. Carmichael*, 526
 17 U.S. 137, 148 (1999). For expert testimony to be admissible, it must “be relevant to the task at
 18 hand and helpful to the jury.” *United States v. Pena-Santo*, 809 F.3d 686, 694 (1st Cir. 2015).

19 Under FRE 702, before admitting expert testimony, “the district court must perform a
 20 ‘gatekeeping role’ [to] ensur[e] that the testimony is both ‘relevant’ and ‘reliable.’ ” *United States*
 21 v. *Valencia-Lopez*, 971 F.3d 891, 897–898(9th Cir. 2020); *Kumho Tire*, 526 U.S.137. “A district
 22 court enjoys substantial discretion to decide whether to admit or exclude relevant expert
 23 testimony.” *Pages-Ramirez v. Ramirez-Gonzalez*, 605 F.3d 109, 115 (1st Cir. 2010).

24 A trial court must be sure that its review of expert testimony focuses “solely on principles
 25 and methodology, not on the conclusions they generate.” *Daubert*, 509 U.S. at 592-94, 596.
 26 Here, Mr. Kahrs’ testimony and proposed opinions should be excluded because they do not meet
 27 the requirements imposed by FRE 702, as it is not assistive or reliable, but rather seeks to usurp
 28 the role of the jury and improperly lend credibility to Defendants case. FRE 403.
 Expert testimony that may confuse or mislead the jury or the probative value of which is
 outweighed by risk of unfair prejudice should nevertheless be excluded. FRE 403. Such

1 testimony does not assist the jury. Accordingly, Mr. Kahrs cannot give opinion testimony unless
 2 it qualifies under FRE 702 *and* it will **assist** and not confuse the jury.

3 **1. The Trial Judge is to Protect the Jury from Improper Expert Testimony—is the expert
 4 qualified to give opinion testimony.**

5 Under Daubert, the district judge is “a gatekeeper, not a fact finder.” *Daubert*, 509 U.S. at
 6 592-94, 596 (citing *United States v. Sandoval-Mendoza*, 472 F.3d 645, 654 (9th Cir.2006)). The
 7 courts “acknowledged the district court's duty to ‘act as a ‘gatekeeper’ to exclude junk science
 8 that does not meet Federal Rule of Evidence 702's reliability standards.” *Messick v. Novartis
 Pharmaceuticals Corp.*, 747 F.3d 1193, 1197 (9th Cir. 2014). (*citing Ellis v. Costco Wholesale
 Corp.*, 657 F.3d 970, 982 (9th Cir.2011)). FRE 702 establishes a “gate-keeping” function, by
 9 which “the trial judge [has] the task of ensuring that an expert's testimony both rests on a reliable
 10 foundation and is relevant to the task at hand.” *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S.
 11 at 597.

12 First, the court first determines if the proposed expert testimony is reliable. Second, if the
 13 expert testimony is reliable the court then determines if the proposed expert testimony is 'fit' to
 14 advance a material aspect of the case. *Id. at* 590-591. Even if it may pass the initial test, expert
 15 testimony may be excluded if the reasoning or methodology underlying the testimony is invalid
 16 or irrelevant to the issues in the case. *Id.* (trial judge must ensure that any and all testimony or
 17 evidence admitted is not only relevant, but reliable). “Expert opinion testimony is relevant if the
 18 knowledge underlying it has a valid connection to the pertinent inquiry and it is reliable if the
 19 knowledge underlying it has a reliable basis in the knowledge and experience of the relevant
 20 discipline.” *City of Pomona v. SQM North America Corp.* 750 F.3d 1036, 1043–1044 (9th Cir.
 21 2014). This “‘gate-keeping’ obligation applies not only to testimony based on ‘scientific’
 22 knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge.” See
 23 *Kumho Tire*, 526 U.S. at 141.

24 An expert's bald assertion is not admissible. Indeed, the current version of FRE 702 was
 25 adopted in 2000, and was intended to be specifically “in response to *Daubert*.” See FRE 702,
 26 Advisory Comm. Notes to 2000 Amendments. “The amendment affirms the trial court's role as
 27

gate-keeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony.” *Id.* Further, because the “admissibility of all expert testimony is governed by the principles of FRE 104(a), … the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence.” *Id.*; *Daubert v. Merrell Dow Pharms., Inc.* (Daubert II), 43 F.3d 1311, 1378 (9th Cir. 1995). The expert’s findings must be based on objective, independent validation of the expert’s methodology. *Sanderson v. International Flavors and Fragrances, Inc.*, 950 F. Supp. 981, 993 (C.D. Cal. 1996).

9 The expert must have appropriate qualifications-special knowledge, skill, training
10 experience, or education on the subject matter. FRE 702; *U.S. v. Hankey*, 203 F.3d 1160,1168
11 (9th Cir. 2000), citing *Jones v. Lincoln Elect. Co.*, 188 F.3d 709, 723 (7th Cir. 1999) (opinion
12 must be an opinion informed by the witness' expertise rather than simply an opinion broached by
13 a purported expert); *Wilson v. Woods*, 163 F.3d 935,937 (5th Cir. 1999) (court should refuse to
14 allow an expert to testify if he is not qualified in a particular field or on a particular subject).

15 “The test ‘is not the correctness of the expert’s conclusions but the soundness of his
16 methodology,’ and when an expert meets the threshold established by FRE 702.” *City of Pomona*
17 *v. SQM North America Corp.* 750 F.3d 1036, 1044 (9th Cir. 2014) (citing *Daubert v. Merrell*
18 *Dow Pharmaceuticals, Inc.*, 43 F.3d 1318 (9th Cir. 1995). “The focus of the district court’s
19 analysis must be solely on principles and methodology, not on the conclusions that they
20 generate,” and “the court’s task is to analyze not what the experts say, but what basis they have
21 for saying it.” *Grodzitsky v. American Honda Motor Co., Inc.* 957 F.3d 979, 984–985 (9th Cir.
22 2020).

23 Mr. Kahrs recites select evidence and usurps the role of the jury, evaluating and stating his
24 conclusion from the evidence. For example, [REDACTED]
25 [REDACTED], " *Id.* at pg. 12;
26 " [REDACTED]
27 [REDACTED]
28 [REDACTED] *Id.* at pg.

19. Mr. Kahrs' deposition testimony is no different. For example: " [REDACTED]

20. [REDACTED] Exh. C at 216:25-217:1.

21. **2. The Trial Judge is to Protect the Jury from Improper Expert Testimony—is the
testimony helpful or is it misleading and confusing to the jury.**

22. While expert testimony can be helpful to the jury, the powerful nature of expert testimony
23. has a potential to mislead the jury. *U.S. v. Rincon*, 28 F.3d 921, 925 (9th Cir. 1994).

24. *Daubert* reiterates that the district court may exclude relevant expert evidence pursuant to FRE
25. 403 “if its probative value is substantially outweighed by the danger of unfair prejudice, *confusion*
26. *of the issues*, or misleading the jury.” *Daubert*, 509 U.S. at 595; *Rincon*, 28 F.3d at 926. To guard
27. against the risk that jurors will accept an expert's testimony simply because he or she is an expert,
28. a district court must ensure that all expert testimony is “not only relevant, but reliable.” *Daubert*,
29. 509 U.S. at 589, (1993). *Daubert* invoked an important constraint on expert testimony that is
30. particularly relevant here:

31. Rule 403 permits the exclusion of relevant evidence ‘if its probative value is
32. substantially outweighed by the danger of unfair prejudice, confusion of the issues, or
33. misleading the jury....’ Judge Weinstein has explained: ‘Expert evidence can be both
34. powerful and quite misleading because of the difficulty in evaluating it. Because of
35. this risk, the judge in weighing possible prejudice against probative force under Rule
36. 403 ... exercises more control over experts than lay witnesses.’ *Daubert*, 509 U.S. at
37. 595, quoting 138 F.R.D. 631, 632 (1991).

38. *Jinro Am. Inc. v. Secure Investments, Inc.*, 266 F.3d 993, 1005 (9th Cir. 2001), opinion amended
39. on denial of reh'g, 272 F.3d 1289 (9th Cir. 2001). “[U]nfair prejudice means ‘undue tendency to
40. suggest decision on an improper basis, commonly, though not necessarily, an emotional
41. one.’” *United States v. Hankey*, 203 F.3d 1160, 1172 (9th Cir. 2000) (quoting FRE 403 advisory
42. committee's note).

43. In *U.S. v. Rincon*, 28 F.3d 921 (9th Cir. 1994), Rincon proffered Dr. Pezdk's expert
44. testimony about eye witnesses. The 9th Circuit held that the district court did not abuse its
45. discretion when it “found that Dr. Pezdek's testimony would not assist the trier of fact and that it
46. would likely confuse or mislead the jury.” *Id.* at 925. “Given the powerful nature
47. of expert testimony, coupled with its potential to mislead the jury, we cannot say that the district
48. court abused its discretion in excluding the testimony.” *Id.* at 926.

court erred in concluding that the proffered evidence would not assist the trier of fact and that it was likely to mislead the jury.” *Id.* at 926.

3. The Trial Judge is to Protect the Jury from Improper Expert Testimony—is the testimony based on specialized knowledge, skill, or training?

Expert testimony is limited to matters that require specialized knowledge, skill, experience, training. FRE 702. Testimony is admissible under FRE 702 if the subject matter at issue is beyond the common knowledge of the average layman. *United States v. Winters*, 729 F.2d 602, 605 (9th Cir. 1984). A determination if there was consumer confusion is not beyond the common knowledge of the average layman, and does not require testimony from a damages expert. There is no special skill involved in reading emails, seeing demonstrative evidence (business card, meeting agenda, etc.), or listening to non-technical testimony about sales meetings to determine if customers were confused. Mr. Kahrs’ “expert” testimony relating to customers may be excluded on that basis alone—it does not require special knowledge, skill, experience, training, or education. *Id.*

Mr. Kahrs’ rebuttal to the Cox damages report and his “opinion” on lost profits is founded on *his* conclusions from what was said in meetings and emails, which were incomplete and explained by XINGKE. In Mr. Kahrs’ report, and in deposition explaining the basis for his opinion, Mr. Kahrs asserts customers were not confused and proceeds to opine there are no trademark damages. *Gaitan Decl.* at Exh. B at pp. 14 and 16-20; Exh. C at 85:9-21;105:19-106:23; 108:18-109:4; 100:7-23; 111:1-4;113:8-12;114:13-115:9;121:25-123:8; 125:5-13; 125:18-126:21; 213:21-214:6; 216:17-217:1;217:16-22; and 229:20- 230:2. Putting aside for now that actual confusion is not required for damages, *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1146 (9th Cir. 1997), whether customers were confused is the jury’s role.

“Generally, the use of expert testimony is not permitted if it will usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it. When an expert undertakes to tell the jury what result to reach, this does not *aid* the jury in making a decision, but rather attempts to substitute the expert’s judgment for the jury’s.” *United States v. Diaz* 876 F.3d 1194, 1197 (9th Cir. 2017) [internal citations

1 omitted]; *see* FRE 702(a).

2 Indeed, FRE 704(a) provides that expert testimony that is “otherwise admissible is not
 3 objectionable because it embraces an ultimate issue to be decided by the trier of fact.” That said,
 4 “an expert witness cannot give an opinion as to her legal conclusion, i.e., an opinion on an
 5 ultimate issue of law.” *Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1016. (9th
 6 Cir. 2004.) Mr. Kahrs opinion of *no confusion so no damage* is an ultimate legal conclusion for
 7 the jury to make. *Gaitan Decl.* at Exh. B pp 9-11.

8 Confusion, like likelihood of confusion, is a mixed question of fact and law for the jury to
 9 decide. The determination of the state of affairs (a ‘foundational fact’) is a finding of fact, but the
 10 further determination of confusion based on those factors is a legal conclusion. See *Playboy*
 11 *Enterprises, Inc. v. Terri Welles, Inc.*, 78 F. Supp. 2d at 1081–82. (S.D.Cal.1999). Mr. Kahrs
 12 acknowledged that confusion was for the jury to decide.

13 *Q.* You understand that it's up to the jury to determine whether or not there
 14 was trademark infringement?⁴

15 *Kahrs.* [REDACTED]

16 *Gaitan Decl.* at Exh. C at 77:6-9. But it didn’t dissuade him from determining there was no
 17 confusion.

18 For example, Mr. Kahrs states:

19 *Kahrs.* [REDACTED]

20 *Id.* at 27:19-24. Mr. Kahrs incomplete opinion was, “[REDACTED]”

21 [REDACTED] *Id.* at 216:23-217:1. Mr.
 22 Kahrs basis this decision on a single email, and concludes that [REDACTED] made his decisions
 23 based on the capabilities of both companies, and was not confused by his decision, despite not

24

 25 ⁴ “Trademark law aims to protect trademark owners from a false perception that they are associated with or endorse a
 26 product.” *Mattel Inc. v. Walking Mt. Prods.*, 353 F.3d 792, 806 (9th Cir.2003). The traditional elements of a claim for
 27 trademark infringement are ownership of a protectable mark and likelihood of confusion arising from defendant’s use
 28 of the mark. *Applied Info. Scis. Corp. v. eBay, Inc.*, 511 F.3d 966, 969 (9th Cir.2007) The failure to prove instances
 of actual confusion is not dispositive against a trademark plaintiff, because actual confusion is hard to prove;
 difficulties in gathering evidence of actual confusion make its absence generally unnoteworthy. *Eclipse Associates*
 Ltd. v. Data Gen. Corp., 894 F.2d 1114, 1118–19 (9th Cir.1990)

1 speaking to him or anyone at [REDACTED] Mr. Kahrs failed to consider the evidence of confusion
 2 that SINCO has repeatedly asserted in this litigation in Motion Practice and otherwise, as
 3 apparently XINGKE failed to provide such information to Mr. Kahrs. *Id.* at Exhs. D-L.

4 In regards to [REDACTED] Mr. Kahrs states “[REDACTED]
 5 [REDACTED]

6 [REDACTED] *Id.* 107:12-14. Again, without full context to all evidence. *Id.* at Exh. I.

7 Mr. Kahrs opines, “[REDACTED] which again is outside the scope of his report,
 8 despite the overwhelming evidence presented regarding Mr. Tjoa's meeting in December with
 9 [REDACTED] and other evidence as to confusion. *Id.* 108:25-113:12. Again without full context to all
 10 evidence. *Id.* at Exhs. D-F.

11 Even more concerning was Mr. Kahrs provided this inappropriate legal conclusion after
 12 conducting the following review: Mr. Kahrs reviewed **zero** of Defendants sales, and profit and
 13 losses (*Id.* at Exh. C 18:21-20:1 and 35:4-9), **zero** of SinCo's purchase orders (*Id.* at 19:24-20:4),
 14 and cherry picked from Cox's Appendix B of what he felt was most pertinent after his staffed
 15 culled them out. *Id.* 43:10-15. Moreover, Mr. Kahrs testified:

16 *Kahrs.* [REDACTED]
 17 [REDACTED]

18 *Id.* at 28:4-7. (Emphasis Added)

19 In addition to his lack of review, Mr. Kahrs came to these inappropriate legal conclusions
 20 that there was no infringement with [REDACTED] and [REDACTED] despite SINCO producing evidence
 21 of Mui Liang Tjoa's presentation to [REDACTED] on **December 10, 2016**, the audio recording of Mr.
 22 Tjoa's presentation to [REDACTED] on **December 10, 2016**, the transcript of audio recording of Mr.
 23 Tjoa's presentation to [REDACTED] on **December 10, 2016**, the email communication between [REDACTED]
 24 of [REDACTED] and Mr. Tjoa confirming that the [REDACTED] email communications between [REDACTED] of
 25 [REDACTED] and Mr. Tjoa with [REDACTED] email communications between Bryan Lim and Xu Shugong
 26 where Mr. Lim discusses Yiming and Mark Liew's mistake of telling SINCO customers that
 27 SINCO HQ and Humen are different companies, and a copy of the 'Public' Office Action refusals
 28 issued by USPTO based on likelihood of confusion for Trademark Applications No. 87307929

1 and No. 87307939, owned by SINCO. *Gaitan Decl.*, Exh. D-I, and M.

2 Paradoxically, Mr. Kahrs states that he has no evidence of lack of confusion anywhere,
 3 that he can base his personal knowledge on, which illustrates the lack of basis for concluding
 4 there is no infringement. *Id.* at Exh. C at 221:25-222:4. Allowing an expert to give his opinion on
 5 the legal conclusions to be drawn from the evidence both invades the court's province and is
 6 irrelevant." *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir.1983). This Circuit has
 7 stated that "[e]xpert testimony should be excluded 'if it concerns a subject improper for expert
 8 testimony, for example, one that invades the province of the jury.'" *U.S. v. Lukashov*, 694 F.3d
 9 1107, 1116 (9th Cir. 2012). An expert should not be permitted to give opinions that reiterate what
 10 the lawyers offer in argument.⁵ *Intermedics, Inc. v. Ventrifex, Inc.*, 139 F.R.D. 384, 390 (N.D.
 11 Cal. 1991).⁶

12 Mr. Kahrs rebuts the Cox report by telling the jury what to find from the evidence by
 13 deciding the ultimate conclusion of law [REDACTED]
 14 [REDACTED]). *Gaitan Decl.* Exh. B pg. 19. Mr. Kahrs, report is internally inconsistent claiming in
 15 one section that SINCO's lost business was because XINGKE no longer manufactured for
 16 SINCO, and in another section that the sales were open competition between SINCO and
 17 XINGKE not related to confusion. That is a prototypical example expert testimony that should be
 18 excluded because its probative value is substantially outweighed by the danger of unfair
 19 prejudice, confusion of the issues, or misleading the jury." FRE 403; *Daubert*, 509 U.S. at 579
 20 and 595.

21 Mr. Kahrs does not rely on stated assumptions—he states the conclusion that the jury is to
 22 reach. XINGKE cannot use Mr. Kahrs as a vehicle for reiterating its factual conclusions to the
 23 jury under the guise of "expert opinion." Mr. Kahrs' expert analysis consists of little more than
 24 reviewing cherry picked documentation provided by counsel in addition to calls with named
 25

26 ⁵ See *Gaitan Decl.* Exh. C at 75:7-25, 90:17-23, and 124:8-126:21.

27 ⁶ See the Advisory Committee's Notes accompanying the 1970 amendments to Rule 26. What the Committee sought
 28 to promote was a fair opportunity to expose whatever weaknesses, unreliabilities, or biases might infect the opinions
 of testifying experts called by adverse parties. Pursuit of such fairness would have been thoroughly frustrated if the
 rule prohibited a party from showing that the opinions an expert was presenting at trial as his own had in fact been
 spoon fed to him and written for him by the lawyer who retained him.

1 Defendants that leads to his opining as to consumer confusion based on a one-sided presentation
 2 of the evidence, without having performed any factual verification, testing, or hands-on review of
 3 the evidence asserted by SINCO to confirm his opinions of infringement. Of course, this assumes
 4 that these are opinions reasonably within the scope of his expertise had he applied some scientific
 5 measure to confirm his theory to form his opinion, which SINCO asserts he did not.

6 **B. The Court Should Preclude Mr. Kahrs' Opinions As Beyond The Scope of**
 7 **Expert Opinion and as Not Being His Opinion**

8 With these principles in mind, this Court should preclude Mr. Kahrs' opinions and/or
 9 testimony—not because he disagrees with SINCO's expert Cox or he would analyze differently,
 10 but because his analyses do not pass muster under *Daubert* and FRE 702 and 403.

11 Mr. Kahrs' report claims to address four topics: lost profits, increased costs, unjust
 12 enrichment, and disgorgement. To formulate his opinions and/or testimony, Mr. Kahrs relies
 13 exclusively on dubious, if not outright wrong, assumptions—he assumes the jury will decide as
 14 he tells them and he assumes incorrect law. Similarly, Mr. Kahrs reports have been excluded for
 15 the same types of unsupported assumptions that we find in his report in this action. *Gaitan Decl.*
 16 at Exh. A. The methodology used by Mr. Kahrs is riddled with unsupported assumptions and is,
 17 at best, unscientific. Ironically, when Mr. Kahrs opinion provides a calculation as to potential
 18 damages, it is the calculation of SINCO's expert who determined a 14% margin. *Id.* at 210:5-12.
 19 Mr. Kahrs' report adopts the regression analysis of Mr. Fleissig, who is not properly disclosed as
 20 a testifying expert, in fact he was explicitly disavowed as an Expert. *Id.* Exh. N.

21 Mr. Kahrs' opinions are anchored in the legal conclusion⁷ that there was no consumer
 22 confusion and no trademark infringement, which would serve to do nothing more than tell the
 23 jury what result it should reach. The law would be in a curious state if jurors received their
 24 instructions on the law from an expert witness as well as from the trial judge. *United States v.*
 25 *Ingredient Technology Corp.*, 698 F.2d 88, 97 (2d Cir.). Expert testimony here would have been
 26 not only superfluous but mischievous. *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d

1 1051, 1059 (9th Cir. 2008).

2 This motion is not because SINCO disagrees with Mr. Kahrs' opinions. Rather, it is
 3 because Mr. Kahrs' "opinions" are not expert opinion at all. Rather, he purports to tell the jury
 4 what it should conclude from the evidence, as he was instructed by Defendants. To make matters
 5 worse, Mr. Kahrs asserts incorrect law.

6 **1. Mr. Kahrs' Regression Analysis Should be Excluded as he is Not Qualified to Form
 Such Opinions, Nor did He, Rather he Relies on Mr. Fleissig's Analysis**

7 Beginning on page 21 of Mr. Kahrs' report and continuing through page 23 is a discussion
 8 of statistical regression, in rebuttal to Cox's regression. *Gaitan Decl.* Exh. B at pp. 21-23. A lucid
 9 analysis and discussion by Mr. Kahrs of statistical regression would likely aid the jury and qualify
 10 as expert testimony, but it was not written by Mr. Kahrs. Mr. Fleissig—alone—*did all the work*
 11 *on regression*:

12 *Kahrs.* [REDACTED]

13 *Id.* at Exh. C at 55:25-56:2.

14 Q. ... who ran the regressions?

15 *Kahrs.* [REDACTED]

16 ...

17 Q. What did Dr. Adrian Fleissig help you with?

18 *Kahrs.* [REDACTED].

19 ...

20 Q. Anyone help Adrian on the regressions?

21 *Kahrs.* [REDACTED].

22 Q. That's definitive?

23 *Kahrs.* [REDACTED]

24 ...

25 *Kahrs.* ... [REDACTED]

26 Q. So Dr. Fleissig ran all of the regressions ... that were used in your report?

27 *Kahrs.* [REDACTED]

28 *Id.* at 155:14-21; 156:18-21; 158:5-10 (Emphasis Added). As admitted, Mr. Fleissig, not Mr.
 Kahrs, is the person that worked on the methodologies. *Id.* at 258:24-259:5. Mr. Fleissig did not

1 submit a report, nor was he disclosed as a testifying expert. Exh. N.

2 Failure to furnish a report prepared by [the expert] constitutes a violation of FRCP
 3 26(a)(2). A court may permit an expert to testify about an expert report even if that report was
 4 not drafted entirely by him, if the expert “substantially participated” in the preparation of his
 5 report.⁸ *Bekaert Corp. v. City of Dyersburg*, 256 F.R.D. 573, 579 (W.D. Tenn. 2009). This is not
 6 such a case. Mr. Kahrs’ “participation” in the statistical regression portion of the Report was to
 7 take what Mr. Fleissig wrote and put it in the report:

8 *Kahrs.* [REDACTED]

9 [REDACTED]
 10 *Gaitan Decl.* Exh. C at 160:24-161:2. That hardly qualifies as substantial participation. In
 11 *Bekaert*, the court granted the motion to strike the expert designation of defendant’s expert, Mr.
 12 Hynes.

13 Here, the Court is presented with evidence that Mr. Hynes' report was originally
 14 prepared by Defendant's counsel. When questioned about this, Mr. Hynes could not
 15 actually point to any portion of the declaration, which could be said to have been
 16 his testimony. As such, the present set of facts is more akin to the situation in
 17 which testimony was wholly prepared by counsel with Mr. Hynes participation
 18 amounting to his signature after reviewing the document. Mr. Hynes' declaration
 fail[ed] to comport with the expert reporting requirements.” under Rule 26(a)(2)(B).

19 256 F.R.D. at 579-580. Distinguishing *Bekaert* on the basis that Mr. Kahrs' report was prepared
 20 by a Ph.D rather than Defendants' lawyer is a distinction without a difference.

21 Mr. Kahrs' deposition testimony is to be contrasted with a small but very significant
 22 statement in his report: [REDACTED].” *Gaitan Decl.* Exh. B pg. 23. That is a patent
 23 falsehood. *Fleissig ran the regressions.* Exh. C 155:14-21; 156:18-21; 158:5-10.

24 As noted above, and stated in FRE 702, expert testimony is to *assist* the jury to understand
 25 evidence. There are two limited areas in Mr. Kahrs' report that could be helpful for the jury, but
 26 Mr. Kahrs should not be permitted to testify as to either because his testimony would be

27 _____
 28 ⁸ In this regard, Plaintiff submits that “substantial participation” is measured by the extent of input on each specific subject matter, not the total number of pages. For example, Mr. Kahrs prepared all 23 pages evaluating evidence and determining the issue of confusion, but he had 0 participation in the 3 pages of regression analysis.

1 confusing and mislead the jury. FRE Rule 403; *Daubert*, 509 U.S. at 595; *Rincon*, 28 F.3d at 926

2 An explanation of regression is something that would aid the jury, if Mr. Kahrs was well
 3 versed on the subject and had written that part of Mr. Kahrs report. However, Mr. Kahr's
 4 explanation, as evident from his report and his deposition, is far from lucid or helpful to the jury.
 5 *Gaitan Decl.* at Exh. B pp. 22-23; Exh. C at pp. 139:1-12; 143:25-146:1; 153:21-155:21; and
 6 158:6-23.

7 Confusing expert testimony is to be excluded for being not helpful. FRE Rules 702 and
 8 403. No doubt Mr. Kahrs' explanation was strained and confusing because he did not write that
 9 part of the report.

10 **2. Mr. Kahrs testimony on an outlier of sales is incomplete, not helpful, and contradicted
 11 by deposition testimony.**

12 There is one limited area in Mr. Kahrs' report, written by Mr. Kahrs, that may be within
 13 his expertise: the effect of a large increase in sales in November and December—what Mr. Kahrs
 14 terms an outlier—that Mr. Kahrs contends affects the projection of future sales. Testimony on
 15 that subject could be helpful for the jury **if** it were complete and consistent. Mr. Kahrs' testimony
 16 on that subject is neither. His opinion that a one-time spike in sales affects future predicted sales
 17 is very superficial; it says no more than that. Without more, there is no methodology.

18 For his report, Mr. Kahrs stops his analysis at October (*Gaitan Decl.* Exh. B pg. 21; Exh.
 19 C 186:13-17) which eliminates altogether the later sales in November-December. A reasonable
 20 jury would be left to wonder what about those sales, what would the projection be if those sales
 21 occurred in other months or were spread over 2-3 months.

22 Those sales did occur and Mr. Kahrs does acknowledge the sales occurred. However, Mr.
 23 Kahrs does not account for them; in his report he simply pretends they did not occur. The report,
 24 which disregards those sales, is contradicted by his deposition: "It could that these [November-
 25 December sales] were late invoices." Id. at C at 137:17-18. His analysis, disregarding those sales
 26 entirely, is not based on a valid methodology.

27 Moreover, when explaining the regression of Mr. Fleissig, Mr. Kahrs states:
 28 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 Exh. C at Pg. 171:23-172:3. However, SinCo's counsel explained that these documents were
 4 provided, and bates labeled and sent to XINGKE's Counsel. *Id.* at 172:4:12. He then states, "I
 5 [REDACTED]" and [REDACTED] which illustrates the lack
 6 of review and preparation for this report which explains his speculative conclusions and that
 7 Defendants Counsel was spoon feeding him documents only beneficial to XINGKE. *Id.*

8 3. Mr. Kahrs Is Not Qualified as A Consumer Behavior Expert

9 Mr. Kahrs' report is founded on his interpretation of what customers thought from certain
 10 statements. By his interpretation customers were not confused and took their business to
 11 Defendant for non-trademark reasons. That is an opinion on consumer behavior, not damages.

12 Mr. Kahrs has no qualifications to opine on what consumers would think and/or how they
 13 would react to various stimuli. To give opinion testimony the witness must be qualified as an
 14 expert by specialized knowledge, skill, experience, training or education **in the particular field**
 15 **or subject** on the subject of his proposed testimony. FRE Rule 702; *Wilson v. Woods*, 163 F.3d
 16 935,937 (5th Cir. 1999) (court should refuse to allow an expert to testify if he is not qualified in a
 17 particular field or on a particular subject). Mr. Kahrs has no qualifications in the field of
 18 consumer behavior.

19 A good example of a purported expert not qualified in a particular field is *United Food*
 20 *Mart, Inc. v. Motiva Enterprises, LLC*, 404 F. Supp. 2d 1344 (S.D. FL, 2005). There, a consumer
 21 behavior expert was not qualified to render an opinion on whether two business were in the same
 22 competitive relevant market. Although he was an expert in consumer behavior, which is one
 23 aspect of economics, he was not an expert in all fields of economics.

24 The opinion on what motivated end users to purchase from one source or another is not
 25 within the scope of Mr. Kahrs' experience or special knowledge (he has no training or education
 26 in the field of consumer behavior). His experience is accounting. *Gaitan Decl.* Exh. C at 35:15-
 27 17- 36:21-25.) Mr. Kahrs cannot offer an opinion on customers' purchasing decisions as a non-
 28 expert. Witnesses not testifying as experts may only give opinions rationally based on their

1 perception and not based on technical or other specialized knowledge within the scope of FRE
 2 702. There is no evidence that Mr. Kahrs observed any of the matter on which his report is
 3 founded.

4 **4. Mr. Kahrs' opinion is based on law that does not apply in the 9th Circuit**

5 To compound his take-over of the role of the jury, Mr. Kahrs takes over the role of the
 6 judge and the lawyers by stating propositions of law which are inconsistent with law applicable in
 7 the 9th Circuit. That is not helpful to the jury. Instead, it is *misleading* and likely to confuse the
 8 jury.

9 More than once Mr. Kahrs' report incorrectly asserts that actual confusion is required for
 10 an award of lost profits. *Gaitan Decl.* Exh. B at pp 9-11. Contrary to what Mr. Kahrs says, actual
 11 confusion and actual damage, i.e. actual lost sales, is not required. In this Circuit. *Southland Sod*
 12 *Farms v. Stover Seed Co.* 108 F.3d 1134, 1146 (9th Cir. 1997).⁹

13 Mr. Kahrs then bases his rebuttal on that incorrect assertion of applicable law:
 14 [REDACTED]

15 [REDACTED]
 16 *Gaitan Decl.* at Exh. B at pp. 9, 11. That erroneous proposition of law undermines Mr. Kahr's
 17 criticism of SINCO's expert. Moreover, *it misleads the jury*.

18 Mr. Kahrs also asserts conclusions of law. [REDACTED]

19 [REDACTED] *Id.* at Exh. C at 59:8-10.

20 This again is in willful ignorance of the Supply Agreement between SINCO and XINGKE and
 21 related Purchase Orders, which each create an obligation by XINGKE, but do not support his
 22 conclusions of law.

23 Mr. Kahrs lack of "expertise" in the law further shows itself in his testimony contradicting

24 ⁹ ... "an inability to show actual damages does not alone preclude a recovery under section 1117." Under Lindy
 25 Pen, the preferred approach allows the district court in its discretion to fashion relief, including monetary relief, based
 26 on the totality of the circumstances; ... even if a plaintiff is unable to demonstrate damages resulting from the
 27 defendant's § 43(a) violation, § 1117 allows the district court to award the plaintiff any just monetary award so long
 28 as it constitutes "compensation" for the plaintiff's losses or the defendant's unjust enrichment and is not simply a
 "penalty" for the defendant's conduct ... Additionally, when, as in this case, a § 43(a) claim involves false
 advertising rather than 'palming off,' courts have been more willing to allow monetary damages even without a
 showing of actual consumer confusion." [internal citations omitted].

1 his report. The report says trademarks [REDACTED]” *Id.* at Exh. B pg. 10. But his
 2 deposition testimony correctly states that trademarks protect the name and brand. *Id.* at Exh. C at
 3 76:17-19.

4 According to his resume, Mr. Kahrs has no expertise in the law and is not qualified to
 5 opine on it. Here he has usurped the role of lawyers (as well as having usurped the role of the
 6 jury). Mr. Kahrs may correctly repeat what is stated in a treatise, (which he admitted he did not
 7 personally review in drafting this report (*Id.* at Exh. C at 67:10-19)) but the treatise does not state
 8 the controlling law in this circuit. Basing an opinion on incorrect or inapplicable information
 9 does not save an expert’s testimony.

10 **5. Exclusion of expert testimony is necessary when the "expert lacks the 'good grounds' for
 11 his or her conclusion."**

12 Mr. Kahrs’ opinion on no lost profits is admittedly not based on sound methodology, as
 13 required. [REDACTED]
 14 [REDACTED].” *Id.* at Exh. C pg. 62:8-12.

15 From his deposition testimony it is seen that Mr. Kahrs’ “opinions” (improper as they are)
 16 are rife with speculation. [REDACTED] and “[REDACTED] and “[REDACTED] is not sound a
 17 methodology. “I [REDACTED].” *Id.* 77:22-78:2. “[REDACTED]
 18 [REDACTED].” *Id.* at 101:13. [REDACTED]” *Id.* at 247:1-3.

20 Bald assertions based on speculation and not validated by facts or methodology are not
 21 admissible opinion. “[REDACTED]
 22 “[REDACTED].” *Id.* at 82:15-18. The “supplier”—
 23 Defendant—is a contract manufacturer that uses tooling and dies designed and made by SINCO.
 24 There is no analysis to support that assertion. Neither Mr. Kahrs’ report or his deposition
 25 testimony analyzes alternate contract manufacturers or SINCO itself. *Gaitan Dec* at Exh. K.

26 Q. What was SinCo Singapore’s production output? What could it produce?

27 Kahrs. [REDACTED].

28 ...

Kahrs. [REDACTED]

1 [REDACTED] .”

2 *Gaitan Decl.* Exh. C at 218:7-10 and 218: 21-23.

3 The expert's findings must be based on objective, independent validation of the expert's
 4 methodology. *Sanderson v. International Flavors and Fragrances, Inc.*, 950 F. Supp. 981, 993
 5 (C.D. Cal. 1996). Mr. Kahrs could base his opinion on information from XINGKE—if he had
 6 validated the information. But he did not validate information, but rather remained willfully
 7 ignorant to claim plausible deniability to explain his incomplete review. For example, stating he
 8 was told Defendant could provide better quality products:

9 Q. Did you see any products maybe next to each other for comparison?

10 Kahrs. [REDACTED]

11 Q. Did you touch the products?

12 Kahrs. [REDACTED].

13 *Gaitan Decl.* at Exh. C at 252:5-10.

14 Opinions must be based on valid reasoning and reliable methodology. *In re: TMI*
 15 *Litigation*, 193 F.3d 613, 665 (3d Cir. 1999). They cannot be based on "subjective belief or
 16 unsupported speculation." *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 806 (3d Cir. 1997).
 17 And, the opinion must be validated. *Sanderson*, 950 F.Supp. 993.

18 6. Mr. Kahrs discussion of increased costs is not based on facts or data

19 Mr. Kahrs criticism of Cox's cost analysis is incomplete and lacks reliable information.
 20 For example, "Cox ignores inflation" but Kahrs does not inform what the rate of inflation has
 21 been; "... there have been changes in technology..." but Kahrs does not inform what those
 22 changes are or how they might affect SINCO's expert report. Without giving underlying data for
 23 his assertion, his testimony is not based upon sufficient facts or data and is not founded on a
 24 sound methodology, as required by *Daubert*, 509 U.S. at 579, 592-593 and FRE 702. The
 25 testimony would be *misleading*, rather than helpful.

26 7. Mr. Kahrs' unjust enrichment opinion is not founded on data and usurps the role of the 27 jury

28 Reciting an IRS Revenue Ruling is not an opinion. Cf. *Network Appliance, Inc. v.*

1 *Bluearc Corp.*, 374 F. Supp. 2d 825, 844 (N.D. Cal. 2005) (“Dr. Faillace merely recites the
 2 applicable legal standard, concluding that numerous features of the claimed invention are neither
 3 expressly nor inherently present in the Sandberg reference”). Mr. Kahrs’ opinion on the topic is
 4 devoid of data and methodology. And it is based on speculation: “Dr. Cox fails to consider
 5 material factors which **likely** influenced the sales price... [emphasis added].” *Gaitan Decl.* at
 6 Exh. B. at pg. 26. Further, as with his analysis of lost profits, Mr. Kahrs usurps the jury’s
 7 function of deciding the evidence and concluding there is no link of the increase in value to the
 8 trademarks. *Id.* at pg. 29.

9 **8. Mr. Kahrs’ disgorgement testimony usurps the role of the jury**

10 As with his Lost Profits” opinion, Mr. Kahrs’ opinion on disgorgement, (*Id.* at pg. 30),
 11 also asserts his conclusion that certain customers were not confused and Defendant was chosen
 12 due to its capabilities. Again, those are stated as ultimate conclusions of the jury, not as
 13 assumptions.

14 **IV. CONCLUSION**

15 At best Mr. Kahr’s testimony is marginally helpful to the jury as to what he would
 16 consider if giving the opinion on costs and unjust enrichment. At worst his testimony replaces the
 17 jury’s fact-finding role and is highly prejudicial. In either situation the Court must enforce its
 18 gatekeeping function to protect the process.

19 Dated: March 26, 2021

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